



Public Utility Commission of Texas

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Pat Wood, III
Chairman

Robert W. Gee
Commissioner

Judy Walsh
Commissioner

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OCT 18 1996

FCC MAIL ROOM

October 17, 1996

Office of the Secretary
Federal Communications Commission
1919 M. Street, N.W.
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

RE: CC Docket No. 96-128 (FCC 96-388)
In the Matter of Implementation of the
Pay Telephone Reclassification and Competitive Provisions
in the Telecommunications Act of 1996

To the Secretary:

Enclosed herewith for filing with the Commission are an original plus fourteen copies of the Petition for Reconsideration of the Public Utility Commission of Texas in the above captioned matter. In addition, we are submitting two copies directly to the Common Carrier Bureau as requested.

Please acknowledge receipt by affixing an appropriate notation on the duplicate copy of this letter furnished herewith for that purpose and returning same to the undersigned in the enclosed, self-addressed envelope.

Sincerely,

Vicki Oswalt

Director, Office of Policy Development

cc: Common Carrier Bureau

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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OCT 18 1996

In the Matter of

FCC MAIL ROOM

Implementation of the
Pay Telephone Reclassification
and Compensation Provisions of the
Telecommunications Act of 1996

CC Docket No. 96-128

Policies and Rules Concerning
Operator Service Access and
Pay Telephone Compensation

CC Docket. No. 91-35

Petition of the Public Telephone
Council to Treat Bell Operating Company
Payphones as Customer Premises
Equipment

Petition of Oncor Communications
Requesting Compensation for
Competitive Payphone Premises
Owners and Presubscribed Operator
Services Providers

Petition of the California Payphone
Association to Amend and Clarify
Section 68.2(a) of the
Commission's Rules

Amendment of Section 69.2(m)
and (ee) of the Commission's Rules
to Include Independent Public
Payphones Within the "Public
Telephone" Exemption from End User
Common Line Access Charges

**PETITION FOR RECONSIDERATION BY
THE PUBLIC UTILITY COMMISSION OF TEXAS**

1. Pursuant to Section 1.429 of the Federal Communications Commission ("FCC")

Rules, the Public Utility Commission of Texas ("Texas PUC") hereby submits its Petition for

Reconsideration of the FCC's Report and Order¹ adopted September 20, 1996 in the above-captioned proceeding. The Texas PUC has general regulatory authority over telecommunications utilities within our jurisdiction in Texas, as authorized by the Public Utility Regulatory Act of 1995 (PURA95).² The Texas PUC respectfully requests the FCC's reconsideration of a key issue contained in the Report and Order; specifically, the FCC's plan to establish market-based local rates. In addition, the Texas PUC asks for clarification on the issue of state requirements that the FCC considers to be barriers to a fully competitive payphone market.

Local Payphone Service Pricing

2. The Texas PUC asks that the FCC reconsider its decision with respect to the pricing of intrastate payphone service rates, especially local coin calls, on two grounds. First, this decision represents a clear and unwarranted preemption of Texas' authority over intrastate ratemaking. Second, the FCC's decision to allow unrestricted local coin calling rates from payphones is clearly not in the public interest of the citizens of Texas and should not be attempted at this time.

The FCC Need Not Preempt the Intrastate Authority of the States in this Matter

3. The Texas PUC requests that the FCC reconsider its decision to preempt States' intrastate ratemaking authority over payphone rates. The decision should be reconsidered because the FCC has exceeded its authority to implement Section 276(b)(1) of the Federal Telecommunications Act of 1996 (the Act)³. Under Section 276(b)(1), the FCC is authorized to

¹ Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Report and Order, ("Order"), FCC 96-388, Adopted September 20, 1996, Released September 20, 1996.

² Tex. Rev. Civ. Stat. Ann. art. 1446c-0, (Vernon Supp. 1996).

³ Pub. L. No. 104-104, 110 Stat. 56 (1996)(codified at 47 U.S.C. § 276)

establish regulations addressing five specific issues related to payphone service: per call compensation, carrier access charge payphone service elements, nonstructural safeguards, Bell right of negotiation with carriers, and the right of negotiation with location providers.⁴ The establishment of such regulations is a limited grant of authority by Congress to the FCC. In the exercise of this authority, the FCC must be guided by other sections of the Act as well. If other sections of the Act restrict or limit Congress' grant of authority to the FCC, the FCC must limit the exercise of its authority by any specific limitations imposed by Congress.

4. Section 2(b) of the Act restricts the FCC's ability to establish a general plan of compensation for intrastate payphone rates. Specifically, Section 2(b) provides, in part, that:

nothing in the Act shall be construed to apply or give the Commission jurisdiction with respect to...charges, classification, practices, services, or regulations for or in connection with intrastate communication service by wire or radio or any carrier.⁵

5. Based upon Section 2(b), the FCC's ability to exercise its grant of authority under § 276(b)(1) must not be construed to also authorize it to set charges or rates for intrastate payphone service. Rather, the FCC's limited grant of authority by Congress over intrastate payphones is restricted to the establishment of guidelines which States are to follow in specific enumerated situations. This limited grant of authority does not enable the FCC to establish rates for payphone services in general, nor does it give the FCC jurisdiction to order the deregulation of intrastate payphone services.

⁴ 47 U.S.C. § 276(b)(1)(A-E).

⁵ 47 U.S.C. § 152(b)

It is not in the Public Interest to Deregulate Local Payphone Rates

6. The FCC concludes that “once competitive market conditions exist, the most appropriate way to ensure that PSPs receive fair compensation for each call is to let the market set the price for individual calls originated on payphones.”⁶ The Texas PUC supports this theory as it may someday exist in a workably competitive situation; however, it is extremely concerned about the impact the decision may have on consumers within the reality of today’s payphone world. The Texas PUC has evaluated, through complaints, audits, and rulemakings, the public impact of excessive rates charged by certain nondominant carriers acting in conjunction with lightly regulated payphone providers. As a result of the activities of these carriers, the most recent session of the Texas Legislature bestowed *more*, rather than *less*, regulatory authority to the Texas PUC to govern payphone service providers. The Texas PUC examined many of the public interest and costing issues involved with payphones in public hearings and work sessions during the past year and decided, based on information in that formal proceeding,⁷ to retain a cap on the rate for local coin calls.

7. The Texas PUC is not at all convinced that the manner in which payphone providers enter into agreements with location owners will lead in the near future to the fully competitive market which the FCC has assumed in its Report and Order. The FCC itself observes that in some locations, “the PSP may be able to charge an inflated rate for local calls based on its monopoly, pursuant to an exclusive contract with the location provider, on all payphones at the location.”⁸ Yet the FCC orders the deregulation of rates for local calls. The recommendation is

⁶ Report and Order, ¶ 49.

⁷ PUC Project No. 14559, Revision of 16 T.A.C. § 23.54.

⁸ Report and Order, ¶ 59.

analogous to opening the gate under the theory that the horses will remain in the corral, and if that doesn't work, the gate can be closed later.

8. The FCC offers at least one remedy to the difficulty of potential market failures. The Report and Order states that “when the states have concerns about possible market failures, such as that of payphone locations that charge monopoly rates, they are empowered to act by, for example, mandating that additional PSPs be allowed to provide payphones, or requiring that the PSP secure its contract through a competitive bidding process that ensures the lowest possible rate for callers.”⁹ The FCC appears to believe that the states have the authority to cause private location providers to contract with multiple PSPs to avoid monopoly situations. Although that may be true in some states, that is not the case in Texas. The Texas PUC only has regulatory authority over the payphone service providers, and has very little authority over airports, public buildings, convenience store owners, and so forth that own or manage the private premises where the payphone is situated. The FCC’s recommendation in this regard serves only to amplify rather than minimize our concerns over the competitiveness of individual locations.

9. The FCC proposal consists of two phases. During the first phase, local coin rates are set in the same manner as they are now, unless the state wishes to move to market-based rates. During the second phase, which begins one year after the effective date of the Report and Order, the market will be allowed to set the rate for local coin calls, unless the state can show that there are market failures within the state that would not allow market-based rates.¹⁰ The Texas PUC urges the FCC to allow states to establish a rate ceiling during the second phase of the

⁹ Report and Order, ¶ 61.

¹⁰ Report and Order, ¶ 51.

FCC's plan in order to protect the public interest. In that way, the experience of states during the one-year period of phase two can be evaluated without fear of consumer harm. This experimental period will serve to answer the many questions that now exist about the payphone market following the deregulation of ILEC payphone equipment and the institution of the other requirements of the Report and Order. Following that period of settling, states may then be in a position to evaluate whether rates should be fully deregulated, and that decision should be left to the states.

Clarification of Requirements that May Be Barriers

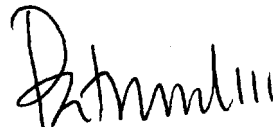
10. The Texas PUC respectfully requests clarification on the scope of the § 276(c) preemption standards described in paragraph 59 of the Report and Order. The FCC states, "Many states impose regulations on PSPs, including *certain requirements* that must be fulfilled before a PSP can enter or exit the payphone marketplace." [emphasis added] The Report and Order then rules that these requirements are entry barriers that must be preempted. The Texas PUC asks that the FCC provide additional guidance on what may be considered as a "certain requirement" that may be preempted under §276(c) of FTA96. For example, the Texas PUC has adopted rules in concert with our enabling statute that require registration (not certification) that must be fulfilled in order for a PSP to operate. Without clarification on the types of requirements that may be found to be barriers, we remain uncertain of our capabilities to provide consumer safeguards.

11. We want to acknowledge the tremendous amount of effort put forth by the FCC in this and other proceedings at this time, and ask that the FCC give serious consideration to this petition.

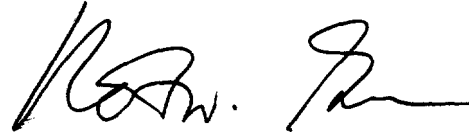
Respectfully Submitted,

Public Utility Commission of Texas
1701 N. Congress Avenue
Austin, Texas 78711-3326


October 16, 1996



Pat Wood, III
Chairman



Robert W. Gee
Commissioner



Judy Walsh
Commissioner